80-1091

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

IN RE: JOSEPH RYAN RIGGS (TERRAZAS),
A Minor
TOMMY JOE RIGGS
and ANN MARIE RIGGS,
Petitioners,

versus

ROBERT TERRAZAS,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF TENNESSEE,
WESTERN SECTION

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether any of the questions presented by the Petition raise significant enough issues to justify granting a Petition for Certiorari.

2. Whether the Court of Appeals of Tennessee erred in refusing to give full faith and credit to a Georgia order of adoption.

3. Whether the Court of Appeals of Tennessee erred in their ruling that the father of the child had such a relationship with the child as to entitle him to due process of law, and if so, whether he received such due process in the Georgia adoption proceeding.

4. Whether Petitioners may raise the issue of the constitutional right of privacy of the mother of the child when that issue was not raised below, and if so, whether there was a failure of the Court of Appeals of Tennessee to recognize

such constitutional right.

5. Whether the Court of Appeals of Tennessee applied Caban v. Mohammed, 441 U.S. 380 (1979) to the instant case, and if so, whether such retroactive application was in error.

6. Whether the Court of Appeals of Tennessee denied the Petitioners their constitutional rights when it ordered the removal of the minor child from their custody.

7. Whether the Court of Appeals of Tennessee denied the minor child his due process rights when it refused to appoint a guardian ad litem.

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Respondent ROBERT TERRAZAS respectfully prays that Petitioners' Petition for Writ of Certiorari to review the decision of the Court of Appeals of Tennessee, Western Section, be denied.

OPINIONS BELOW

The opinions below are set forth in Appendices A - C of the Petition for Writ of Certiorari.

All references herein to those opinions shall be to the Appendix of said Petition.

STATEMENT OF THE CASE

"In the fall of 1977...Terrazas began dating Roneva Anderson...In May, 1978, Miss Anderson became pregnant and considered surrendering the child for adoption. However, Terrazas made it known to Miss Anderson on several occasions that he was desirous of taking the child and raising it." (Court of Appeal opinion, Appendix B of the Petition, pgs. 4a - 4b, hereinafter referred to as "opinion.")

"In the fall of 1978, Terrazas was unable to determine the whereabouts of Miss Anderson. After it became clear to Terrazas that Miss Anderson did not want to marry him, he retained legal counsel. On November 29, 1978, he filed a petition under the Uniform Parentage Act of California seeking to establish a parent-child relationship with his unborn child.

Numerous efforts were made to serve the mother with legal process in California. She was finally located and served on February 25, 1979. Unbeknownst to Terrazas, a petition for adoption had already been filed in Georgia by Mr. and Mrs. Riggs. Also during this time, Terrazas contacted several adoption agencies in an attempt to prevent the feared adoption of his child." (Opinion, page 4b, emphasis added).

Early in January, 1979, Terrazas contacted Father Ryan, who refused to reveal Miss Anderson's whereabouts, although he was at the time arranging for the adoption of the unborn child. In fact, he told Terrazas he knew nothing about the matter. (Opinion, pg. 5b, emphasis added).

Miss Anderson's baby was born on January 29, 1979. Masquerading as Jessica Stewart, she signed a release, surrender and affidavit denying any knowledge of the name

and whereabouts of the child's biological father. As Jessica Stewart she also signed the child's birth certificate. Three days after the child was born, he was delivered to Mr. and Mrs. Riggs in Georgia by Sister Julianna." (Opinion, page 5b, emphasis added).

"On February 7, 1979, Mr. and Mrs. Riggs filed a petition for adoption in the Superior Court of Colquitt County, Georgia. The false affidavits of Miss Anderson, using the assumed name of Jessica Stewart, were attached to the petition. On March 1, 1979, a hearing was held in the Georgia court, and the natural father's rights to the child were terminated. The only evidence before the court on that date as to the father's identity was the false affidavit of the mother. The evidence showed that there was no attempt to verify the identity of the natural father... Early in March, that same agency made its

only contact with the mother, by telephone, whereupon the mother informed the social worker that she did not know the identity of the father." (Opinion, pages 5b - 6b, emphasis added).

"...The final hearing on the adoption was held in Georgia on April 12, 1979, and on the next day the appellants moved from Georgia to Tennessee." (Opinion, p. 6b, emphasis added).

[Terrazas] did not have notice of the Georgia proceedings or adoption and was not before that Court. The mother... evidently did everything she could to keep [Terrazas] from his child and to deny him an opportunity to be heard in Georgia. She was aided and abetted in this by Father Ryan, a friend of [petitioners], who had the child delivered to them for adoption. (Opinion, page 9b).

"After Miss Anderson was served with

the California suit instigated by Terrazas, she denied having a baby, and a continuance was sought by her attorney for a medical examination. When the matter was finally heard in the California court on April 30, 1979, Terrazas was found to be the father of the minor child. As a result of this finding, the California court issued a restraining order against any placement of the child for adoption. It was at that hearing that Terrazas was informed that Miss Anderson had given birth to his son in Nevada, listing her name as Jessica Stewart, and that the child had been adopted by Mr. and Mrs. Riggs in Georgia. "Terrazas then had the minor child's Birth Certificate changed in Nevada to reflect the name of Joseph Robert Terrazas." (Opinion, p. 6b).

"...Terrazas then retained counsel in Georgia and filed an action to determine whether an adoption had taken place. The

action was initially begun in Atlanta, and upon Terrazas' learning that the adoption proceedings had occurred in Colquitt County, Georgia, proceedings were commenced there." (Opinion, page 6b)

"In April of 1979, Mr. and Mrs. Riggs learned of the California suit which had been instituted by Terrazas. Mr. and Mrs. Riggs took no action in this matter until they were served with the papers in this suit, which was commenced in Madison County, Tennessee." (Opinion, page 7b, emphasis added).

"This suit was commenced in the Chancery Court of Madison County on July 26, 1977 ...A hearing was held before the Chancellor on August 7, 8, and 9, 1979. His opinion was released on September 21, 1979... (Opinion, page 2b, emphasis added).

As the foregoing quotes from the Court of Appeal illustrate, the proceedings were initially begun before the child was born. The Petitioners herein first learned that

there was an action pending before the child was three months old. Papers were served on them in Tennessee before the child was six months old. The matter was tried when the child was barely six months old. The decision of the trial court granting custody to the father was made when the child was less than nine months old.

The only reason that the minor is still in the custody of the Petitioners is the fact that they chose to seek and obtain a stay of the trial court's order and then later a stay of the appellate court's order.

REASONS FOR DENYING THE WRIT

1. The Questions Presented by the Petition Do Not Raise Significant Enough Issues to Justify Granting Certiorari.

The facts of this case are unique. No case has been cited which is even remotely similar in factual background to the instant case.

The father's efforts in this case began before the birth of the child and continued for months after in four different states. The mother's actions were extremely unusual in her deceiving the father, her filing of false documents in three different states, and her lying under oath upon more than one occasion.

The adoption in question was an independent adoption, one where the child is placed directly with the adoptive parents, rather than through an adoption agency. In the instant case, a clergyman was the intermediary for the adoption, and he, too, lied to the natural father about the whereabouts of the child.

Thus, the factual background presented here is of an unusual and complicated nature, replete with countless twists to the central controversy. The path to a resolution can therefore not be drawn straight, but must provide detours designed to deal with these

factual idiocyncracies. For this reason, it follows that any decision rendered in this case could not set clear precedent for future cases of this kind, but would of necessity be mired down by numerous provisos applicable to the instant situation only. Certiorari is therefore not appropriate here.

2. The Georgia Decision was Not Entitled to Full Faith and Credit Because the Georgia Court Had No Jurisdiction.

Even were this Court to ignore the unique aspects of this case, the decision of the Tennessee Court of Appeals was completely sound. There is no contention that the father ever received notice of the pending adoption proceeding. No amount of argument or obfuscation can take away this fundamental fact.

It is a well-settled principle that a judgment of a sister state in which the court lacked jurisdiction over either a party or the subject matter of the suit is open to collateral attack and

cannot be saved by the full faith and credit clause of the United States Constitution. People of the State of New York, ex rel., Halvey v. Halvey, 330 U.S. 610, 614 (1947); Williams v. State of North Carolina, 325 U.S. 226 (1945); Milliken v. Meyer, 311 U.S. 451, 462 (1940), rehearing denied, 312 U.S. 712 (1941).

The above general principle was applied in an adoption context in the case of Armstrong v. Manzo, 380 U.S. 545 (1965). Therein the father was given no notice of a pending step-parent adoption. After the adoption, the father moved to set it aside, contending that the adoption decree was void because of a lack of notice to him. The U.S. Supreme Court stated:

> It is clear that failure to give the Petitioner notice of the pending adoption proceedings violated the most rudimentary demands of due process of law. (Armstrong, page 550).

The Tennessee Court of Appeals properly stated the issue as follows:

> The issue becomes, then, whether the Appellee, the natural father, had established such a relationship with his natural minor child as to entitle him to due process of law specifically, notice and an opportunity to be heard before his parental rights, if any, could be terminated by any court. (Petition, Appendix B, pg. 10b).

The Tennessee Court of Appeals relied upon the leading U.S. Supreme Court cases of Stanley v. Illinois, 405 U.S. 645 (1972), and Quilloin v. Walcott, 434 U.S. 246 (1978). Petitioners wish to limit Stanley to its facts, but ignore the broad constitutional principles enunciated in that case and set forth in the Tennessee Court of Appeals opinion, to wit, notice is required where a putative father has shown a tangible or significant interest in the child.

3. Respondent was Entitled to Notice as the Father of the Child and a Parent Who Demonstrated a Tangible Expression of Interest in the Child.

The rights of parents and their children to mutual association have long been considered as "fundamental", and as such, are rooted not only in natural law, but also in the First, Ninth and Fourteenth Amendments to the United States Constitution. This Court, in Stanley v. Illinois, 405 U.S. 645 (1972) noted:

> The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential' "basic civil rights of man", and "rights far more precious than property rights." It is cardinal with us that the custody, care and nurture of the child reside first with the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder." (405 U.S. at 651, emphasis added; citations omitted).

United States Supreme Court cases since Stanley display a continued sensitivity for the rights of the unwed father to the care and companionship of his own flesh and blood. Quilloin vs. Walcott,

434 U.S. 246 (1978); Caban vs. Mohammed, 441 U.S. 380 (1979).

In Quilloin, the unwed father of an eleven year old child was seeking to prevent the child's stepfather from adopting him. 434 U.S. at 247. The Court first examined the constitutionality of Georgia's adoption laws and then went on to hold that the adoption could proceed. Id. at 248.

Pivotal to the Court's decision were two factors which render the Quilloin situation crucially different from that presented in the case at bar: Firstly, the Court noted that:

> "This is not a case in which the unwed father at any time had, or sought, actual legal custody of his child." Id. at 255.

Having recognized that the father had never taken any steps to support or legitimize the child before the adoption petition was filed, the Court then pointed out that the father's constitutional

rights were not abridged as he had been given a full hearing when seeking to legitimize the child. Id. at 253.

As applied to the instant case, Quilloin stands for two basic propositions: (1) That an unwed father is entitled to the due process safeguards of notice and a hearing before his parental rights may be terminated, and (2) The Court will inquire as to whether the father has sought to support or legitimize his child before his parental rights may be justifiably terminated.

Because of the deceit of the mother, however, the father herein was prevented from living with his child or contributing to the child's support, although he displayed a strong desire to do both.

Assuming for the sake of argument that the deceit of the mother, her frustration of the father's efforts, and

what appears to be the complicity of the close friend of the Petitioners and intermediary for this adoption, Father Ryan, is not sufficient to give the father the right to notice and an opportunity to be heard, the question then becomes one of whether he has shown "a tangible expression of interest in the child."

A review of the facts amply demonstrates both the father's tangible efforts to locate the mother, live with and support his child, and to prepare himself for assuming the role of a parent. Since a comprehensive summary of these facts has already been included herein, they will not be reiterated here (See Statement of Case, pages 2 to 8, supra).

4. The Court of Appeals Did Not Fail to Recognize the Privacy Rights of the Mother.

The Petition states this issue as one of whether the Court of Appeals

erred in failing to recognize the constitutional right of privacy of the mother, who "refused to disclose the identity" of the father. There are a number of defects in Petitioners' argument. The first problem is that this issue has never been raised before. The opinion of the Court of Appeals which recorded the issues that were before that court, shows that this privacy issue was not among those presented [see Appendix B, pp. 2b-3b]. It is a well-settled rule that one cannot raise an issue on appeal which has never been raised below.

The next difficulty encountered is one of standing. The mother was not a named party to the proceedings in the Court below, nor did she appear in person or through counsel. Again, it is an issue of very basic constitutional law that, with certain exceptions not applicable here, one cannot raise the constitutional rights of another person not a party to the

proceeding.

The final problem with the Petitioners' position is that they simply misstate the facts. This is not a case of a mother who "refused to disclose the identity." The mother here did not choose to do so, but rather filed a false affidavit in which she swore she neither knew the identity nor the whereabouts of the natural father.

Even if the Petitioners were able to surmount this factual inaccuracy, and the other two obstacles just discussed, the argument should fail on its merits. Petitioners have not cited one case in support of their contention that the mother has a right to privacy which permits her to refuse to give the name of the natural father in a proceeding for the adoption of their child.

The case of Roe v. Norton, 422

U.S. 391 (1975) cited by Petitioners involved a Connecticut statute which required the mothers receiving aid to name the putative father, and made it a misdemeanor if the mother refused. The Supreme Court twice vacated the case and remanded it to the district court to consider the issue in light of further legislation. It is difficult to see where the Roe case stands for any proposition, let alone the broad statement attributed to it by Petitioners.

Also relied upon by Petitioners is the case of Roe v. Wade, 410 U.S. 113 (1973). The Roe case involved a married mother challenging Texas criminal abortion statutes. The Supreme Court discussed the constitutional right of privacy and noted that only such rights which are "fundamental" or "implicit in the concept of ordered liberty" are included and gave examples of the right of pro-

creation, the right of child rearing and education, and the right to marry (Roe v. Wade, supra, pgs. 152 - 153).

The final case relied upon by the Petitioners, Planned Parenthood of Missouri v. Danforth, 428 U.S. 52 (1975) involved another issue of abortion legislation. It is interesting to note that Justice Stewart in his concurring opinion said:

> "Previous decisions have recognized that a man's right to father children and enjoy the association of his offspring is a constitutionally protected freedom." (Planned Parenthood, supra, 428 U.S. at pg. 90).

5. The Tennessee Court of Appeals did Not Improperly Apply the Caban Case.

Petitioners argue that the Tennessee Appeals Court in some manner improperly retroactively applied the case of Caban v. Mohammed, 441 U.S. 380 (1979). First of all, the Tennessee appellate court expressly disclaimed relying on Caban when it stated:

> "As to this retroactivity issue, we go further and state that we have not found it necessary to fit the Appellee within the Caban guidelines. We believe that the Appellee amply meets the test of de facto fatherhood as set out in Stanley, supra, and Quilloin, supra (Petition, appendix B, pg. 18b).

Even if the Tennessee court had applied Caban, it would have been an appropriate use of retroactive application, as demonstrated by Petitioners' own authority, Chevron Oil Company v. Huson, 404 U.S. 97 (1971).

Chevron Oil set forth the three factors be considered when dealing with the issue of nonretroactivity. The first factor is whether a new principle of law has been established by either "overruling clear past precedent on which litigants may have relied...or by deciding an issue of first impression whose resolution was not clearly foreshadowed...". The Caban opinion neither overrules clear past

precedent nor was it an issue of first impression whose resolution was not clearly foreshadowed.

As to the second factor - i.e. "whether retroactive application will further or retard the operation of the rule", the Caban guidelines would certainly only advance the concept of due process to natural fathers first introduced in the Stanley v. Illinois, 405 U.S. 645 (1972), decision and further illuminated in Quillion v. Walcott, 434 U.S. 246 (1978).

As to the last factor - i.e., whether retroactive application of Caban could produce unequitable results, it should briefly be noted that the decision in that case was handed down very shortly after Petitioners had rushed their adoption through the Georgia courts and before the full three-day habeus corpus hearing was held in the Tennessee chancery court. Since the

Georgia court barely considered the father's rights (if at all), it is difficult to fathom how Caban could have affected the outcome there; furthermore, as Caban was already the law at the time of the Tennessee trial, all parties to that hearing were apprised that this opinion existed, thereby eliminating any element of surprise that could be claimed by the Petitioners. Due to this reason, and because Caban was thoroughly consistent with previous Supreme Court pronouncements in this area, even if the Tennessee tribunal had relied upon Caban in reaching its decision, the results achieved could be deemed neither unpredictable nor inequitable.

6. The Tennessee Court Acted In Full Recognition of Petitioners' Constitutional Rights.

Petitioners assert that the Tennessee Courts denied them "full recognition of their liberty rights and due process

rights under the Constitution of the United States" by refusing to honor the Georgia adoption decree and by granting custody of Joseph to his father.

It should be noted at the outset that Petitioners are now raising this issue for the first time; therefore, following the normal rules of appellate review, their present argument on this point is not properly within the Court's scope of review. Even if this issue were properly before the Court, the argument is without foundation.

Petitioners are purportedly basing their "fundamental rights and justifiable expectations" as the "legal" parents of Joseph upon the Georgia adoption decree. (see Petitioners' brief, pg. 27). However, for reasons previously stated, that decree is null and void and therefore cannot give rise to a legal claim of parentage (see Section 2, supra).

If Respondents claim that they acquired due process or liberty rights as attempted or purported adoptive parents, then Petitioners' own authority of Smith v. Organization of Foster Families, 431 U.S. 816 (1977) will put this claim to rest.

In Smith, this Court recognized that although children could develop ties with a family based upon an "intimacy of daily association", foster parents did not possess a "liberty interest" in the continued relationship with the children placed in their care (431 U.S. at 836; see also Petitioners brief, pg. 28). In addition, the concurring opinion in Smith squarely rejected this notion of the "psychological family" by stating that "...prolonged third party custody of children does not create some sort of 'squatter's rights'" (431 U.S. at 860, Justice Stewart concurring).

Petitioners next proceed to claim that the laws of Georgia presume that they would prevail in a custody dispute against a "third party", they being the purported parents. As support for this assertion, Petitioners cite Georgia Code §74-108, and Perkins v. Courson, 219 Ga. 611, 135 S.E. 2d 388 (1964). However, neither one of these authorities stands for the proposition stated; in fact, both further strengthen Respondent's right to the custody of his son.

Perkins v. Courson, supra, dealt with a natural father seeking custody of his son as against the maternal grandparents (the child's mother was deceased).

The Perkins Court analyzed the applicable statutes and case law dealing with this subject. It was pointed out that the only way to lose custody of one's natural minor child under Georgia law if no unfitness was shown, was by one of the means specified

in Georgia Code §74-108 (the statute cited by Petitioners, supra) - i.e., by: (1) Voluntary release to a third person; (2) Consent to adoption by a third person; (3) Failure to provide necessaries or abandonment; (4) Consent to the child's receiving the proceeds of his own labor; (5) Consent to marriage of the child, or, (6) Cruel treatment (emphasis added). (219 Ga. at 614, 135 S.E. 2d at 391).

None of these grounds could be applied to Respondent's actions, and indeed, Petitioners do not attempt to do so. What they do suggest, however, is that these criteria apply to them as persons attempting to adopt the child, and that Joseph should not be removed from their custody unless one of the above conditions is found. It must be noted, however, that Respondents could

cite no authority in support of this rather novel proposition.

Lastly, Petitioners contend that the trial court granted custody of Joseph to his father without having sufficient evidence as to his parental fitness. In this context, Respondent draws the Court's attention to specific findings of the Tennessee trial court:

> "This Court finds Plaintiff to be a fit, qualified, and suitable person to assume custody of his son." (Finding no. 9, pg. 7a of Appendix)
>
> "The Court finds that the Plaintiff is ready to assume full parental responsibilities. This conclusion is supported by the proof before the Court. The father has the personal ability to fulfill a child's need for support, affection, stimulation, guidance and restraint*** He would make a good father and a fine role model.***(Finding No. 12, pg. 8a).

In conclusion, therefore, neither of the courts below denied Petitioners any of their fundamental constitutional

rights by holding that Respondent, as the unqualifiedly fit parent of his minor son, was entitled to his custody.

7. It Was Not Necessary to Appoint a Guardian ad Litem Below.

We quote from the Tennessee Court of Appeal opinion, (Appendix to Petition for Certiorari, page 19b):

> "The rights of the minor child were fully protected at the habeas corpus proceeding, and the chancellor's decision not to appoint a guardian ad litem was proper and within his sound discretion."

Petitioners argue that somehow this decision of the Tennessee appellate court was in error; however, they fail to cite any case which even remotely stands for the proposition that a guardian ad litem must be appointed in custody disputes, let alone any case, as here, where the struggle is between those claiming to be the purported adoptive parents and the natural parent of the child.

Petitioners cite Wisconsin v. Yoder, 406 U.S. 205 (1972), which involved first amendment rights of freedom of speech, and the education of Amish children. The case of In Re Gault, 387 U.S. 1 (1967) cited by Petitioners, dealt with the rights of a juvenile in what amounts to a criminal proceeding. Petitioners also cite Parham v. J.R., 442 U.S. 584 (1979), a case involving the question of voluntary commitment of minors for mental illness treatment. That case, if it has any relevance at all to this matter, is a recognition that "...natural bonds of affection lead parents to act in the best interests of their children." (Parham, supra, pg. 602).

In addition, the Petitioners cite Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972). That case was a one-paragraph memorandum decision of the Supreme Court and it is difficult to see what guidance it can offer. Likewise, the

case of Smith v. Organization of Foster Families, 431 U.S. 816 (1977) cited by Petitioners, is of little help on the issue before the Court in the instant matter, as the quotation cited by Petitioners dealt with the issue of standing.

Petitioners also claim that it is "theoretically impossible for any child to ever claim the ear of a trial court" in these sort of matters "unless his interest can be protected and presented by a guardian ad litem." Constitutional procedural rights should not be predicated on theoretical possibilities, but rather should be founded on the realities of litigation. Approached in this fashion, it is clear that there is no merit to Petitioners' argument.

CONCLUSION

Petitioners, in their conclusion, argue that in some manner, the granting of custody to the father in this case is a

threat to the institution of adoption.

The instant case is not one of an innocent couple going to an agency seeking adoptive placement. Here, we have a direct or independent adoption where the potential adoptive parents chose to deal directly, through their agents, with the natural parents, except that they clearly failed to involve the natural father. They did not ask anything regarding the natural father, nor did they ask why the child was being put up for adoption. However, they did swear in the Georgia court, that "the natural father of the child is unknown."

As is discussed herein, Part 1, supra, the facts of this case are unique. If this case has any effect outside of the parties, it will be the beneficial one of possibly deterring the misfeasance, malfeasance and nonfeasance which is

evident throughout this case.

This matter has dragged on for over two years and across the continent. Every court that has ruled on the case has ruled in favor of the father. There is no reason, legal or equitable, for this Court to grant the Writ of Certiorari. It is time for this matter to come to an end and for the father to be united with his son. We respectfully ask that the Court deny the Petition for Certiorari.

Dated: January 27, 1981

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CERTIFICATE OF SERVICE

I hereby certify that, on the date shown below, a copy of the foregoing Response in Opposition to Petition for Writ of Certiorari of Tommy Joe Riggs and Ann Marie Riggs was mailed, first class, postage prepaid, to:

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Dated: January 30, 1981

NORDIN F. BLACKER

NORDIN F. BLACKER
Attorney for Respondent

I further hereby certify that 40 copies of the foregoing Response in Opposition to Petition for Writ of Certiorari of Tommy Joe Riggs and Ann Marie Riggs was mailed, first class, postage prepaid to the Clerk

of the Supreme Court of the United States, Supreme Court Building, Washington D.C. 20543.

Dated: January 30, 1981

NORDIN F. BLACKER

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